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In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA, APPELLANT

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.,
APPELLEES

On Appeal from the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE APPELLEES

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QUESTIONS PRESENTED

The Commonwealth of Virginia imposes criminal penalties on sellers of books and periodicals if they display materials that are deemed "harmful" to juveniles, but that are constitutionally protected as to adults, in a manner whereby juveniles may examine and peruse them. The questions presented are:

1. Whether the Virginia statute, which sharply restricts adults' access to books and periodicals that they have a constitutional right to peruse and buy, violates the First Amendment.

2. Whether bookstores, and trade associations representing sellers, publishers, and distributors of books and magazines, have standing to bring a pre-enforcement challenge to the Virginia statute.

PARTIES TO THE PROCEEDING

The appellants in the court of appeals were the Commonwealth of Virginia and William K. Stover, Chief of Police for Arlington County. The Commonwealth of Virginia is the only appellant in this Court.

The appellees in the court of appeals, all of whom are appellees in this Court, were:

The American Booksellers Association, Inc., the major national trade association of booksellers. The Association has approximately 4000 members, including chain bookstores, private bookstores, and department store bookstores. Its members account for more than 80% of all sales of books of general interest by bookstores nationwide. The Association has members located in Virginia, including appellees Books Unlimited, Inc. and Ampersand Books.

The Association of American Publishers, Inc., the major national trade association of publishers of general books, textbooks, and educational materials. The Association has approximately 300 members, consisting of most of the major commercial book publishers in this country, and many smaller and non-profit publishers, including university presses and scholarly associations. The books published by the Association's members are sold throughout the United States, including Virginia, at bookstores, department stores, supermarkets, drug stores, newsstands, and other outlets.

The Council for Periodical Distributors Associations, the national trade association for more than 400 independent local wholesale distributors of magazines, paperback books, and newspapers. Its members are located and do business in every state of the United States, including Virginia.

The International Periodical Distributors Association, Inc., the national trade association for the principal pe-

riodical distributors. The Association's members are engaged in distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the country for ultimate distribution to retailers and the public in every state in the United States, including Virginia.

The National Association of College Stores, Inc., a trade association comprising approximately 2600 college and university bookstores located throughout the United States, including Virginia. Its members represent more than 95% of the higher education retail market for books.

Books Unlimited, Inc., a general retail bookstore located in Arlington, Virginia.

Ampersand Books, a general retail bookstore located in Alexandria, Virginia.

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In the Supreme Court of the United States

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No. 86-1034

COMMONWEALTH OF VIRGINIA, APPELLANT

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL., APPELLEES

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE APPELLEES

STATEMENT

This case is about freedom of speech in its most fundamental aspect—about the right of the people to display and sell, and to peruse and buy, books and magazines and newspapers. It raises the question whether government is free to impose severe new restrictions on the rights of adults to have access to expressive materials that may be deemed "harmful" to some children.

At issue is the constitutionality of a Virginia statute that imposes criminal punishment on sellers of books and periodicals if they display materials that contain "explicit and detailed" accounts of sexuality, and that are deemed by the statute to be "harmful to juveniles," in a manner "whereby juveniles may examine and peruse" them. Violation of this provision is a Class 1 misdemeanor punishable by a one-year term of imprisonment and a fine of $1000. Va. Code §§ 18.2-11, 18.2-391(e). Appellees, who are or represent sellers, publishers, and distributors of books, magazines, and other printed matter, challenged the statute under the First and Fourteenth Amendments. Both courts below agreed

with appellees that the statute is unconstitutional and enjoined its enforcement.

A. The Virginia Statute.

Since 1970, following this Court's decision in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Commonwealth of Virginia has made it a criminal offense "knowingly to sell or loan to a juvenile" sexually explicit materials that are deemed to be "harmful to juveniles" as defined by statute. Va. Code §§ 18.2-390 and 391. Effective July 1, 1985, the State amended this statute by adding a provision that makes it a crime "to knowingly display [such materials] for commercial purpose in a manner whereby juveniles may examine or peruse [them]." Va. Code § 18.2-391(a).

The Virginia juvenile display statute covers a broad range of expressive materials. It applies to "[a]ny book, pamphlet, magazine, printed matter however reproduced, or sound recording" that contains explicit depictions or descriptions of sexual conduct and that, taken as a whole, is "harmful to juveniles." Va. Code § 18.2-391(a)(1), (2). The phrase "harmful to juveniles" is defined to mean "that quality of any description or representation, in whatever form, * * * [that] (a) predominately appeals to the prurient, shameful or morbid interest *of juveniles*, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material *for juveniles*, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value *for juveniles*." Va. Code § 18.2-390(6) (emphasis added). A "juvenile" is defined as anyone under 18 years of age. Va. Code § 18.2-390(1).

The Virginia juvenile display statute is, therefore, by no means limited to what the State and its amici call "pornography," or "calculated purveyance of filth," or "X-rated materials," or "indecent literature," or "dirty books." See Va. Br. 9, 19, 30; Minn. Am. Br. 19-20; Inst. Youth Adv. Am. Br. 11; NLF Am. Br. 1, 9. In-

deed, there is no dispute in this case about the power of the states to prohibit both the display and the sale, to adults and children, of hard-core pornography that meets the constitutional standard of what is obscene. Rather, the Virginia statute sweeps within its coverage a wealth of both serious and popular literature that adults have a clear constitutional right to buy but that could be viewed as unfit for children (especially younger children) under "prevailing standards in the adult community" because of sexually forthright scenes or themes. In particular, our contemporary literature has, ever since Joyce and Lawrence, been strongly committed to the candid depiction of the erotic as an essential element of reality. Modern fiction, from Proust and Hemingway to Genet and Philip Roth, contains frequent depictions of sexual conduct, some of it vivid and even disturbing. And a great many non-fiction works, especially in the fields of health, science, and human relations, also deal forthrightly with sexual subjects.

Given the breadth of this coverage, the 1985 amendment imposed a severe new burden on establishments selling books and magazines within the State.[1] The prior statute had prohibited the *sale* of a particular book to a particular juvenile if the bookseller had reason to believe that the book lacked serious value for that child and would instead simply appeal to his prurient interests. That version of the statute itself imposed a difficult task on the bookseller, who had to make a quick on-the-spot judgment about the appropriateness of a given book or magazine for a juvenile of that age and maturity. But the task was at least a manageable one, involving a rough judgment whether a specific item should be sold to a specific youth. In contrast, the amended statute requires booksellers in advance to ensure, on pain of criminal penalties, that no books, pamphlets, or magazines

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[1] Books and magazines are sold today not only in traditional bookstores, but also—and, in some locations, primarily—in supermarkets, drugstores, etc. For convenience, in this brief we often refer to "booksellers" to describe all such retailers.

meeting the vague standard of "harmful to juveniles" are *available* anywhere in the bookstore where any juvenile "may examine and peruse" them. And in determining whether a particular book on display would be considered "harmful to juveniles," the bookseller is forced to apply the statutory test in the hypothetical context of the youngest and least mature browser.

Accordingly, a conscientious bookseller wishing to be certain to abide by the 1985 amendment to the Virginia statute must engage in rigorous self-censorship in one of three ways: (a) he can eliminate from inventory all books and magazines, no matter how clearly important and serious (and no matter how clearly comprising material that adults have a constitutional right to peruse and buy) that might, because they include sexual depictions, be viewed as "harmful" to the youngest juvenile; (b) he can display such books and magazines in "adults only" sections of the bookstore or put other severe restrictions on access to them; or (c) he can exclude children entirely as customers (perhaps by "carding" all customers, as is done in bars).[2] These alternatives, however, would dramatically reduce the availability of constitutionally protected books and periodicals and would have a severe adverse effect on the bookseller's business.

B. The Litigation.

1. On July 16, 1985, appellees filed this action in the United States District Court for the Eastern District of Virginia to challenge the validity of the 1985 display statute under the First and Fourteenth Amendments.[3] Appellees contended that it was "not possible, under the terms of the [1985] Amendment, to restrict the display of materials covered by the Amendment to juveniles without also restricting such access by adults" (J.A. 17).

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[2] Some of these options are of course not meaningfully available to outlets such as newsstands and grocery stores.

[3] The suit was originally brought against local officials. The Commonwealth of Virginia intervened in the suit as defendant and is now the only party appellant.

Appellees charged that the statute "effectively requires booksellers to remove from their shelves substantial amounts of * * * constitutionally protected matter, thereby restricting the right of adult customers to view, peruse and purchase protected literature" (J.A. 17-18). Appellees further claimed that the statute violates the First Amendment rights of more mature juveniles, whose access to books is limited to the level appropriate for the youngest children (J.A. 18-19). Appellees also attacked the new statute as vague, because "the words 'display,' 'harmful to juveniles' and 'in a manner whereby juveniles may examine and peruse'" fail to "provide adequate notice of an offense under the Amendment" (J.A. 19).

Following an evidentiary hearing, the district court held the juvenile display statute unconstitutional (J.S. App. A15-A30). The court found that "the average general bookstore in the Northern Virginia area carries a significant percentage of materials (varying between 5-25%) that are 'harmful to juveniles' as defined in the statute" (*id.* at A20); in the case of appellee Books Unlimited, for instance, "approximately 10-15% of its books may not be displayed under the new law" (*ibid.*). Books that fall within the display provision "come from a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health" (*ibid.*). Although some books and magazines are subject to the provision because of explicit photographs or pictures on their covers, "[m]ost of the[] books [that] come within the statute's fairly broad ambit [do so] on the basis of their content" (*ibid.*).

The district court also specifically found that ready access to books is "critical" to their sale to the reading public (J.S. App. A20):

> In all bookstores, the display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell. Customers often become familiar with a book, and desire to purchase it only after browsing

> and looking through the shelves. Customers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content.

Accordingly, at appellee Ampersand Books, for example, "at least one copy of every title carried * * * is on display" (*ibid.*).

The district court considered various means of complying with the juvenile display provision and found that none was practicable. First, bookstores could decline to carry any materials that fall within the statutory definition of "harmful to juveniles." However, since the statute extends to a substantial proportion of bookstores' inventory and applies to "a number of very popular books, including some best sellers, this alternative is not commercially feasible" (J.S. App. A21).

Bookstores could also refrain from publicly displaying these materials by keeping them behind the counter. However, "since the display of books is so crucial to their sale, such a move would substantially hurt sales" (J.S. App. A21). Furthermore, "due to the large number of books involved, this alternative would require bookstores to significantly alter the structure of their stores" (*ibid.*).

Alternatively, bookstores could create an "adults only" section in which to display such materials. This solution would generate its own problems, however, because "many adults would be reluctant and embarrassed to browse in an 'adults only' corner of the store, and sales of books placed in this new area would undoubt[ed]ly drop" (J.S. App. A21). Beyond that, because the juvenile display provision encompasses material in "a wide variety of literary disciplines, such as fiction, romance, photography, and best sellers[,] books which are 'harmful to minors' are mixed into so many different subject areas that it would be almost impossible for booksellers to sort through the books to create a new section" (*ibid.*). "An 'adult only' area would be costly to create, difficult to monitor, and would create a great deal of confusion in

the mind of a consumer searching for a particular book" (*ibid.*).

Finally, bookstores could attempt to exclude people under the age of 18. The district court found, however, that "such a move would create the impression that the store deals primarily in 'adult only' or pornographic material, which would have a devastating impact upon the store's business" (J.S. App. A21). And "this alternative would certainly have a dramatic impact upon the store's sales of children's books" (*id.* at A20-A21), which account for 10% of the business of appellee Ampersand Books and 40% of the sales of appellee Books Unlimited (J.S. App. A19-A20; J.A. 31, 65).

Based on these findings, the district court set forth its conclusions of law. The court first held that "case or controversy" and "standing" requirements were satisfied because "[t]he bookstores have adequately demonstrated a reasonable fear that the challenged amendment will be enforced against them, that the amendment raises substantial first amendment concerns, and that the amendment has caused and will continue to cause direct, immediate economic injury to their businesses" (J.S. App. A23). The court also concluded that "the significant first amendment questions raised by the plaintiffs' claims clearly make abstention inappropriate" (*id.* at A24).

On the merits, the district court held that the juvenile display provision was overbroad on its face and thus violated the First Amendment. Relying principally on *Butler* v. *Michigan*, 352 U.S. 380 (1957), the court stated that "[i]n promoting the morals of its youth by restricting their access to certain communications, the state may not create barriers which simultaneously place substantial restrictions upon an adult's access to those same protected materials" (J.S. App. A25). The court determined that the Virginia statute would have a crippling effect on adult readers and booksellers (*id.* at A26-A27 (citations omitted)):

> The level of discourse reaching commercial bookshelves cannot be limited to what might be appro-

> priate for an elementary school library. The state's purpose in passing the challenged amendment, however praiseworthy, cannot be pursued by means which effectively stifle an adult's access to communications he or she is entitled to receive. While the intended effect of the amendment is to prevent examination and perusal by minors of certain "harmful" materials, the unavoidable collateral effect of the law is to severely limit the ability of adults to examine these protected materials.

Thus, the inevitable consequence of the provision is "severely [to] limit[] sales to adults" and to impose compliance burdens for booksellers that are "commercially impractical" (*id.* at A27).

2. The court of appeals unanimously affirmed in all relevant respects (J.S. App. A1-A12). It first held that appellees had standing to challenge the 1985 amendment to the Virginia statute. The court recognized the dilemma that the statute created for appellees: "[i]f [appellees] attempt to comply with the amendment, they face economic injury; if [they] continue to conduct their business in their normal fashion, they face the prospect of prosecution" (*id.* at A5-A6). Noting that "[i]t would be unreasonable to assume that the [State] adopted the 1985 amendment without intending that it be enforced" (*id.* at A6 n.4), and emphasizing appellees' "legitimate concern that the amendment will be implemented so as to infringe on their first amendment right[s] * * *" (*id.* at A5), the court held that appellees did "not have to expose [themselves] to prosecution" in order to obtain a determination of the validity of the display provision (*id.* at A6).

The court of appeals also held that the statute was unconstitutional. It agreed with the district court that "book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale" (J.S. App. A9) and that the available methods of complying with the statute would "unreasonably interfere[] with the booksellers'

right to sell the restricted materials and the adults' ability to buy them" (*id.* at A10). Thus, the statute "discourages the exercise of first amendment rights in a real and substantial fashion, and * * * is not readily subject to a narrowing interpretation" (*id.* at A11). Finally, the court of appeals concluded that the display provision was not a valid "time, place, and manner" regulation because it was impermissibly based on the content of the materials (*id.* at A8).

SUMMARY OF ARGUMENT

This case presents a question that is fundamental to the existence of a free and informed society. The Virginia juvenile display statute—which requires bookstores and newsstands to reorganize themselves so that the only books and magazines that are readily accessible are those suitable for young children—greatly restricts the public availability of a vast range of materials, including numerous works of literature, popular fiction, and important nonfiction. By eliminating or severely limiting adult access to publications that may be unsuitable for juveniles but are constitutionally protected for adults, the Virginia statute violates the First Amendment.

1. Appellees have standing to challenge the validity of the Virginia statute. Booksellers are the direct and immediate objects of the statute and must take affirmative steps to comply with it: they are required to purge from their shelves all materials that the statute covers, to put such materials in an "adults only" section or conceal them behind the counter, or to exclude juveniles altogether from their stores. As the courts below found, given the enormous importance of easy accessibility for the sale of printed materials, compliance with the statute would have a devastating economic effect upon booksellers by reducing their sales and increasing their costs of doing business. Accordingly, appellees have suffered injury-in-fact that satisfies Article III requirements for standing. Appellees also have standing to contest the validity of the statute on behalf of readers whose First Amendment rights would be violated if appellees comply with the statute.

Further, this suit is not premature simply because prosecutions to enforce the statute have not yet been brought or threatened. It is the very existence of the statute, recently enacted by the Virginia General Assembly and available for enforcement at the discretion of local police and prosecutors, that creates an immediate deterrent to the exercise of constitutionally protected rights. If, on the merits, the statute is unconstitutional because it forces booksellers to self-censor the materials they make available to the adult public, pre-enforcement relief is necessary to redress that constitutional violation; for if booksellers comply with the statute, the State's position would completely preclude judicial review of the constitutionality of the statute notwithstanding its restraining effect on free speech.

Nothing in principles of justiciability or ripeness requires that booksellers be forced to choose between complying with an assertedly unconstitutional provision and exposing themselves to criminal prosecution. On the contrary, even in the absence of an impending or threatened enforcement action, this Court has allowed First Amendment challenges to statutes that caused an immediate injury to the plaintiff. Here, as in those cases, a real and concrete controversy is presented, and anticipatory relief is essential to the protection of First Amendment rights.

Nor do prudential principles counsel against appellees' standing. In particular, there is no merit to Virginia's veiled hints that the district court should have abstained. This Court has recognized that abstention is generally inappropriate in cases raising First Amendment challenges to state statutes on their face, because the delay involved in abstaining could itself result in the continued violation of constitutional rights. Abstention is especially inappropriate in this case, since the challenged statute cannot be meaningfully narrowed in a single proceeding and is not susceptible of a limiting construction that would obviate or simplify the federal constitutional issue. The basic prerequisites for abstention are therefore lacking.

2. The world of books and ideas, like life itself, is inextricably entwined with human passion and sexuality. Many serious and important works of literature, popular bestsellers and other modern fiction, and scientific studies in such fields as psychology and human behavior, contain sexually forthright materials that, while appropriate for adults, may be unsuited for some juvenile readers. It is these publications, constitutionally protected as to adults, that are threatened by the Virginia statute.

Contrary to the suggestion of Virginia and its amici, this statute is not necessary to the states' efforts to shield children from the *obscene* materials that the courts have identified as lying entirely outside the pale of the First Amendment's protections. Under *Miller* v. *California*, 413 U.S. 15 (1973), states are free to ban such materials for adults and juveniles alike. Nor is this case about "adult" bookstores; states may undoubtedly prevent juveniles from frequenting such establishments. Nor is this statute restricted to displays that call attention to the sexual nature of the materials or that hurl sexual images into the view of unsuspecting passers-by. Nor is it needed to prevent juveniles from *buying* sexually explicit publications that are inappropriate for their age and maturity; there is no dispute that states may prohibit such sales under *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

What this case *is* about is works of fiction and nonfiction, many of unquestionable worth and beauty, carried in ordinary neighborhood bookstores or other common outlets and maintained in the store in conventional commercial displays or on open shelves. In an effort to prevent the possibility that a juvenile might pick up a book and glance at a sexually revealing text or picture, the Virginia statute prohibits *all* booksellers in the State from displaying *all* such materials in *any* way that could be accessible to juveniles. Thus, to comply with the statute, booksellers must refrain from carrying these materials at all, must keep the materials either behind the

counter or in newly-created "adults only" sections, or must exclude juveniles from the premises altogether. As common experience indicates, and as the findings below fully demonstrate, these required methods of compliance would severely restrict the access of adults to constitutionally protected materials. Accordingly, the Virginia statute runs afoul of the fundamental First Amendment principle, consistently adhered to since *Butler* v. *Michigan*, 352 U.S. 380 (1957), that the state cannot erect legal barriers that confine adults to those materials that are appropriate for juveniles.

Virginia's display statute cannot be saved by this Court's decision in *Ginsberg* upholding a prohibition on sales to juveniles of sexually explicit materials that are not constitutionally protected for them. As the Court itself recognized in *Ginsberg*, sale provisions do not have a spill-over effect on adults; the only rights at stake in *Ginsberg* were those of juveniles, not adults. Moreover, a sale provision comes into play only when a juvenile seeks to purchase a book, so that the bookseller can make a specific (if rough) determination whether that particular publication is suitable for that particular minor; it does not require, as the display provision does, that the bookseller drastically alter his operations by reviewing his entire inventory and eliminating or secreting all materials that might be inappropriate for juveniles. Sale and display statutes therefore have a critically different impact on adult readers and booksellers. It is *Butler*, not *Ginsberg*, that provides the standard for judging the constitutionality of the Virginia juvenile display statute. Under that standard, the Virginia provision cannot stand.

ARGUMENT

VIRGINIA'S JUVENILE DISPLAY STATUTE VIOLATES THE FIRST AMENDMENT

A. Appellees Have Standing To Contest The Constitutionality Of The Virginia Juvenile Display Statute

Although Virginia did not attack appellees' standing in its jurisdictional statement, this Court's order noting

probable jurisdiction directed the parties "to brief and argue the question of appellees' standing." The State has responded by asserting that appellees lack standing to maintain this pre-enforcement challenge to the constitutionality of the juvenile display provision because they "simply failed to show a realistic chance of criminal prosecution to establish the existence of an Article III actual case or controversy" (Br. 14) and because "[a]ny claim of economic injury caused by compliance with the Amendment was founded only on the bookstore owners' misapprehension of what the statute requires" (Br. 15).

Virginia's submission constitutes, in effect, an attempt to turn the 1985 amendment's most profound vice—the immediate pressure that its broad and vague provisions place on booksellers to self-censor so as to avoid criminal prosecution—into an argument *against* any judicial scrutiny whatever of the statutory scheme. The State's position is inconsistent with settled First Amendment justiciability principles and, if accepted, would permit violations of the Constitution to go unchecked.

1. *Appellees Have Suffered An Injury-In-Fact That Satisfies Article III Requirements For Standing.*

Virginia contends (Br. 11-15) that there is no "case or controversy" before the Court under Article III because appellees have not suffered any "injury-in-fact" as a result of the juvenile display provision. Examination of the requirements of the Virginia statute and the record in this case shows that Virginia's argument is without merit.

a. The Virginia statute prohibits covered materials from being "knowingly display[ed] for commercial purpose in a manner whereby juveniles may examine and peruse" them. Thus, sellers of books, periodicals, and other publications are the express and immediate targets of the statute; it is against them that the display provision "directly operate[s]." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973).

In order to make certain that they are in compliance with the juvenile display provision, booksellers must take

"affirmative steps" (*Meese* v. *Keene*, 107 S.Ct. 1862, 1868 (1987)) to review their inventories and to modify their display and selling practices. As the court of appeals observed (J.S. App. A5), "[t]o avoid criminal liability, [appellees] must evaluate the content of all types of printed matter and then prevent minors from having the opportunity to examine and peruse those materials deemed harmful." These self-executing requirements, imposed immediately upon the effective date of the amendment, "constitute[] a cognizable injury in the course of" appellees' business of selling books and other materials to the public (*Keene*, 107 S.Ct. at 1868).

It is elementary learning that a claim under the First Amendment may be made by persons who are the direct objects of a statutory command that obliges them to curtail or end First Amendment activities. See *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972) (a claim of First Amendment violation may be raised by a plaintiff who is "either presently or prospectively subject to the regulations, proscriptions, or compulsions" of the challenged statute). Appellees include (or represent) sellers of books and magazines in Virginia whose normal practices in connection with the sale of books and periodicals are severely and immediately constrained and inhibited by the requirements of the Virginia statute. As the direct objects of these requirements, which obviously restrict appellees' own First Amendment activities, and which must be complied with forthwith on pain of criminal punishment, appellees surely have standing to contest their validity under the First Amendment.[4]

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[4] It has long been recognized that the First Amendment extends not only to the publication of books but also to their sale and distribution. See *Winters* v. *New York*, 333 U.S. 507, 509 (1948); *Smith* v. *California*, 361 U.S. 147, 150 (1959). As the Court remarked in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 65 n.6 (1963), the First Amendment "embraces the circulation of books as well as their publication." See also *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955 n.6 (1984).

For this reason, Virginia is incorrect in asserting (Br. 26-27) that appellees' dissemination of books and periodicals constitutes

b. Appellee booksellers also have standing to raise the First Amendment rights of their customers who would be deprived of free access to constitutionally protected materials if the juvenile display provision were to be obeyed. Since the Virginia statute imposes no duty or penalty on any reader who seeks to peruse or buy any book, it is doubtful whether adult customers who are deprived of such access would themselves have an appropriate form of action (or indeed the practical incentive) to challenge the validity of a statute that has caused compliant or fearful booksellers to hide certain books or remove them from their stores. As a result, "it is only * * * the bookseller who can protect * * * the central First Amendment concern * * * to maintain free access of the public to the expression." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 57, 77 (1976) (Powell, J., concurring).

It is hornbook law that if compliance with a statute would in itself entail a curtailment of another's constitutional rights, the person who is commanded to comply has "corollary" standing to contest the validity of the statutory command. See, *e.g.*, *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977); see generally Hart & Wechsler's Federal Courts and the Federal System, 184 *et seq.* (3d ed. 1973; 1981 Supp.). Indeed, "where the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims * * *." *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 957 (1984).

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commercial speech that is entitled only to limited First Amendment protection. See *Munson*, 467 U.S. at 955 n.6; *Smith*, 361 U.S. at 150. See also *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S.Ct. 2034, 2037 (1986).

c. Finally, the juvenile display provision will cause sellers (and, as a consequence, publishers and distributors) of books and periodicals substantial economic harm by limiting sales and increasing the costs of doing business.[5] The district court expressly found that compliance with the statute's broad and vague terms "would have a devastating impact upon [a] store's business" (J.S. App. A21) and would be "commercially impractical" (*id.* at A27). The court of appeals agreed, concluding that "compliance with the amendment threatens the [b]ooksellers with economic injury" (*id.* at A5) because they will "face a substantial problem * * * in ordering, reviewing, and displaying publications for sale" (*id.* at A9). These findings clearly establish sufficient "injury" to confer Article III standing. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. at 194; *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217 (1975).

2. *Virginia's Objections To Appellees' Anticipatory Challenge To The Statute Are Insubstantial.*

Virginia does not seriously bother to dispute most of the propositions discussed above. Rather, the State's arguments, while couched in terms of standing, really constitute general objections to pre-enforcement judicial review on grounds of justiciability or ripeness: the State contends that appellees "cannot conjure a case or controversy out of thin air where there is no credible evidence that some [appellee], somewhere, has previously violated, is currently violating or intends in the future to violate the Amendment" (Br. 14). This argument is wrong.

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[5] It is evident that, insofar as the juvenile display provision has an effect on the sale of books and other printed matter, it necessarily will have a corresponding impact on the publication and distribution of such materials. These economic losses suffice to confer standing on appellee publishers and distributors. And, as Virginia correctly acknowledges (Br. 14 n.2), appellee trade associations have standing to assert the rights of their members. See, *e.g.*, *International Union, UAW* v. *Brock*, 106 S.Ct. 2523 (1986).

The question here presented on the merits is whether Virginia's juvenile display statute unconstitutionally restricts the free speech rights of booksellers and adult readers. And in this case the same reasons that demonstrate that an unconstitutional restriction exists themselves demonstrate a compelling need for anticipatory relief. For, if the First Amendment is violated here, it is violated because the statute itself creates immediate pressure on bocksellers to impose unconstitutional restrictions on the access of adults to constitutionally protected books and magazines. But if that pressure is complied with, a refusal to provide anticipatory review will frustrate the possibility of any judicial review whatever; and the result will be the successful accomplishment of what—by hypothesis—is an unconstitutional restriction on freedom of speech.

This is, in other words, a case where issues of ripeness collapse into the issue on the merits, because an unconstitutional statute works a present restriction on First Amendment freedoms even though no official enforcement action may be pending or threatened. Even without an explicit threat of criminal proceedings, the fear of prosecution is a powerful deterrent to the exercise of constitutionally protected rights. If booksellers may not seek an immediate judicial determination of the validity of the 1985 amendment, they must either comply with what they believe to be its unconstitutional requirements, thereby relinquishing First Amendment rights and incurring substantial economic harm, or expose themselves to the devastating stigma and financial burden of criminal prosecution. (In the case of the two appellee bookstores—modest neighborhood businesses completely dependent on local goodwill—we are talking about the quite unacceptable risk of "police raids" followed by criminal prosecution for displaying "pornography" to children.) But if booksellers comply, the statute would exert all of its unconstitutional effects while remaining unchallenged and unchallengeable.

The danger in Virginia's approach is the danger of self-censorship. The possibility of criminal liability, cou-

pled with the fear of presure from vociferous groups in the community to comply with what is perceived as "pornography" legislation, will cause many booksellers to bite their tongues and obey the statute. Indeed, given the vagueness of the display provision, there is a serious danger of over-compliance, as booksellers err on the side of caution in determining whether books that may be sold to adults are "harmful to juveniles" or are displayed in a manner "whereby juveniles may examine and peruse" them. Thus the mere existence of the Virginia statute, on the books and subject to immediate enforcement at the discretion of local police and prosecutors, deters the exercise of constitutionally protected rights.

It is in just such circumstances that this Court has repeatedly held that, in order to establish standing in a First Amendment case, a plaintiff need not always expose himself to the risk of criminal prosecution. As the Court stated in *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974):

> [A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

See also *Erznoznik*, 422 U.S. at 217. In the First Amendment context, a delay in judicial resolution "might itself effect the impermissible chilling of the very constitutional right [plaintiff] seeks to protect." *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967). It is the contested "statute's very existence [that] may cause * * * [people] to refrain from constitutionally protected speech or expression." *Munson*, 467 U.S. at 957. See also, *e.g.*, *Houston* v. *Hill*, No. 86-243 (June 15, 1987), slip op. 15-16; *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940).

To be sure, in many cases a plaintiff does not bring suit to challenge a state statute until after he has at

least been threatened with prosecution. But a threat of prosecution is not an indispensable prerequisite to a federal court action: this Court has allowed pre-enforcement challenges to statutes that had an immediate impact upon the plaintiff, even in the absence of an explicit threat, because such review was essential to the protection of First Amendment rights. See, *e.g.*, *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 315 n.12 (1980) (per curiam); *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 301-302 (1979); *Buckley* v. *Valeo*, 424 U.S. 1, 11-12 & n.10 (1976); *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 45 (1961); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 863-865 (1970); see also *Renton* v. *Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986) (pre-enforcement challenge to zoning statute under First Amendment); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (pre-enforcement challenge to obscenity statute under First Amendment).[6] Since under the Virginia display statute appellees must immediately "curtail their * * * [activities] and thus forgo full exercise of what they insist are their First Amendment rights," and since the State "has not disavowed any intention of invoking the criminal penalty provision" against them if they violate the statute (*Babbitt* v. *United Farm Workers*, 442 U.S. at 301-302), a justiciable controversy is presented.

It is not our position that there is an automatic right to pre-enforcement litigation of First Amendment claims. Plaintiffs may not simply "ma[k]e a search of state statutes and city ordinances with a view to picking out cer-

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[6] Even outside the area of free speech, the Court has permitted pre-enforcement challenges in a variety of circumstances. See, *e.g.*, *Andrus* v. *Allard*, 444 U.S. 51, 64 n.21 (1979); *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 81-82 (1978); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973); *Lake Carriers Ass'n* v. *MacMullan*, 406 U.S. 498, 507-508 (1972); *Epperson* v. *Arkansas*, 393 U.S. 97, 100-102 (1968); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 536 (1925).

tain ones that they [think] might possibly be used by the authorities as devices for bad-faith prosecutions against them." *Boyle* v. *Landry*, 401 U.S. 77, 81 (1971). Nor may a plaintiff's standing be based on a risk of prosecution that is "chimerical" (*Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion)) or that lacks "even a remote likelihood" of being realized (*id.* at 505 n.9). See *Doe* v. *Bolton*, 410 U.S. at 188-189. That, however, in no way describes the situation here.

The 1985 juvenile display provision is a "recent" (*Doe* v. *Bolton*, 410 U.S. at 188) expression of the current public policy of the State, a policy that, according to Virginia itself, serves "weighty," "compelling," and "transcendent" state interests (see, *e.g.*, Va. Br. 9, 16, 23). The strict enforcement of "anti-pornography" legislation—particularly juvenile anti-pornography legislation —is forcefully favored by many politically vocal groups and is an attractive avenue of recognition for ambitious police and prosecutors. Under the circumstances, it would be foolhardy for a Virginia bookseller to violate this criminal statute on the theory that it will simply never be enforced; and Virginia's bland suggestion that there may never be enforcement (Va. Br. 6) cannot be taken seriously. The point was succinctly put by the court of appeals: "It would be unreasonable to assume that the General Assembly adopted the 1985 amendment without intending that it be enforced" (J.S. App. A6 n.4).

Virginia's argument (Br. 8, 15) that appellees' fears of injury are "irrational and illusory" because no appellee had ever been subject to prosecution under the prior statute is not persuasive. Booksellers *comply* with the pre-1985 statute because this Court upheld virtually identical provisions in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), and because bans on sale (unlike display bans) can be effectuated without serious disruption of the bookseller's business (see pages 3-4, *supra* and 29-30, 36-37, *infra*). The fact that that statute has not gen-

erated criminal prosecutions is, therefore, completely irrelevant to the question whether a failure to comply with the 1985 amendment would or would not provoke criminal prosecution.

In sum, the prospect that the juvenile display statute would adversely affect appellees was by no means "imaginary or wholly speculative" (*Babbitt* v. *United Farm Workers*, 442 U.S. at 302) when this lawsuit was brought. As the court of appeals stated (J.S. App. A5), appellees "have shown a legitimate concern that the amendment will be implemented so as to infringe on their first amendment right[s] * * *." Appellees were therefore not barred from federal court to contest the constitutionality of the display provision simply because prosecutions under the statute had not yet been commenced or threatened.[7]

Virginia's other objections to appellees' "standing" under Article III are no more substantial. The State argues (Br. 12-13; see also *id.* at 16, 25, 27-29) that "there is nothing in the record to support" the findings of the district court on the coverage of the juvenile display provision and its effect on booksellers. The State has advanced no reason, however, for this Court to reexamine the findings of fact made by the district court and not disturbed by the court of appeals. See *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984). In any event, Virginia's presentation falls far short of showing that the district court's findings are clearly erroneous. Contrary to the State's suggestion (Br. 12, 13, 28), the district court was not required to make specific findings as to exactly which books in the inventory of appellee bookshops are covered by the display provision; a number of illustrative books were identified in testimony or

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[7] We note in this regard that courts routinely have allowed booksellers, publishers, and distributors to bring pre-enforcement challenges to juvenile display statutes. See, *e.g.*, *Upper Midwest Booksellers* v. *Minneapolis*, 780 F.2d 1389, 1391 n.5 (8th Cir. 1985); *American Booksellers Ass'n* v. *Webb*, 590 F. Supp. 677, 681 n.1 (N.D. Ga. 1984); see also cases cited in note 9, *infra*.

introduced in evidence (J.A. 47-51, 53-54, 57, 71-74, 77-81) and, based upon the definitions contained in the statute (J.A. 56), the court properly reached its findings for both the average bookstore in Northern Virginia and for appellees Books Unlimited and Ampersand Books.[8]

3. *Appellees' Claims Satisfy Prudential Standing Requirements.*

Virginia presents (Br. 16-17) a melange of so-called "prudential" reasons why the Court should deny appellees standing to challenge the juvenile display provision. Thus, the State contends that prudential standing turns on a balancing of the "minimal impact" of the display provision on bookstores and the "minuscule number" of books covered by the statute, on the one hand, against "Virginia's compelling interest in protecting the welfare of children" on the other. But these "balancing" arguments have nothing to do with standing. Insofar as the State contends that its interest in protecting minors outweighs the expressive rights of booksellers and adult readers, its contention goes to the merits of appellees' First Amendment claims.

Virginia also objects to appellees' so-called "contrived preemptive strike" against its statute, on the ground that this constitutes a "serious attack[] on State sover-

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[8] Virginia also emphasizes (Br. 13, 15, 27) that appellees' witnesses apparently did not possess a comprehensive and expert acquaintance with the details of the Virginia statute and were unaware of the statutory definition of "harmful to juveniles." However, although the witnesses were not entirely certain of the materials covered by the juvenile display provision, in large part because of the breadth and vagueness of the 1985 amendment (J.A. 26, 30, 56, 61, 74), they made it clear that they had a general understanding of the statutory terms and of the drastic effect the statute would have on their methods of operation (J.A. 41, 42, 47-51, 52-54, 55, 57, 69-74, 79-81). In any event, the district court's findings of fact were based on its independent assessment of the evidence in the case. Compare J.A. 27, 42, 70. That court was unquestionably aware of the definitions in the statute when it made its findings on the quantity and types of books that are encompassed by the 1985 amendment (J.A. 56).

eignty" and is in derogation of "basic principles of federal-state comity" (Br. 16-17). Again, it is not clear just what this has to do with appellees' standing to maintain this action. Is Virginia perhaps hinting that the federal court should have abstained from adjudication? Yet Virginia does not directly argue that abstention was required here, and it has not sought review of the district court's decision not to abstain (J.S. App. A24). See *Pennzoil Co.* v. *Texaco, Inc.*, 107 S.Ct. 1519, 1526 n.9 (1987) (declining to address abstention issue because "appellant has not argued [it] in this Court").

We nevertheless address the abstention issue in view of the vivid impression that may be created by the State's colorful language about "preemptive strikes." The important question, of course, is: just what did this "preemptive strike" preempt? What is it that would happen in the absence of this lawsuit that, while preserving "federal-state comity," would also secure the parties' federal constitutional rights?

Abstention is relevant in two situations: (a) where a state criminal or regulatory statute has been violated and a state enforcement proceeding is pending (or imminent), so that the federal plaintiff has a full and fair opportunity to litigate his federal claims by way of defense in that proceeding; or (b) where a state court proceeding can be brought to resolve antecedent state-law issues or generate a limiting construction of the state statute so as to moot (or at least narrow) the relevant issue of federal constitutional law. Neither of these exists here. No state-court enforcement proceeding is pending; indeed, the constitutional *problem* is that the very existence of this statute will force booksellers to forgo exercising their constitutional rights and comply (or even over-comply) precisely in order to prevent the possibility of a criminal prosecution.

Nor is this an apt setting for the second (so-called *Pullman*) sort of abstention. This Court has "been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment" (*Houston* v.

Hill, slip op. 15), because abstention "might itself effect the impermissible chilling of the very constitutional right [the plaintiff] seeks to protect." *Zwickler* v. *Koota*, 389 U.S. at 252; see also *Procunier* v. *Martinez*, 416 U.S. 396, 402 n.5 (1974).

In any event, in this case no plausible action can be brought in state court to avoid or narrow the coverage of the statute on antecedent state-law grounds. It has never been suggested that appellees might not be covered by the display provision; and, as we explain below (see pages 48-49, *infra*), the State has been unable to come up with an intelligible standard for narrowing the coverage of the statute. Where a statute is not "obviously susceptible of a limiting construction" (*Houston* v. *Hill*, slip op. 19), the essential prerequisite for abstention is missing. See *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 237 (1984); see also *Board of Airport Commissioners* v. *Jews for Jesus, Inc.*, No. 86-104 (June 15, 1987), slip op. 6 ("it is difficult to imagine that the [statute] could be limited by anything less than a series of adjudications, and the chilling effect of the [statute] on protected speech in the meantime would make such case-by-case adjudication intolerable").

Accepting Virginia's general arguments against anticipatory review here would, in sum, simply create an opportunity for the State to play a game of cat and mouse—deciding for itself where and when to enforce the statute, but also allowing the statute to exert its full pressure on booksellers to self-censor in order to avoid prosecution. Abstention doctrines were not designed to give the government the power to deter First Amendment activities indefinitely by enacting a broad criminal statute inhibiting such activities and leaving police and prosecutors with broad discretion to enforce it, while at the same time aborting anticipatory challenges by hinting in appellate briefs that enforcement is unlikely.

A failure to adjudicate the validity of Virginia's juvenile display statute at this time would leave the First Amendment in limbo, with the State in full command of

the question whether and when to permit judicial scrutiny of the statute. No abstention doctrine requires such a perverse result.

B. The Virginia Juvenile Display Statute Violates The First Amendment By Substantially Restricting Adults' Access To Constitutionally Protected Materials

At stake in this case is whether ordinary bookshops (and other places where books and periodicals are sold: newsstands, supermarkets, drugstores, and convenience stores) must conduct their business in such a way that only those books and periodicals "appropriate for an elementary school library" (J.S. App. A26) are readily available to adults (and older juveniles) for browsing and perusal.

Although one might not know it from reading the briefs submitted by the State and its amici, this case is not addressed to the issue whether *obscene* materials can be kept out of the hands of children. Materials that meet the Constitution's standard for obscenity under *Miller* v. *California*, 413 U.S. 15 (1973), may be suppressed with respect to adults *and* children; and establishments that contain such materials ("adult" bookstores) may be placed entirely off limits to children. Thus the State has ample means to prevent children from having access to those materials that could be deemed to present the most serious danger to them.

This case is about a different category of materials entirely: books that comprise "a significant percentage" (J.S. App. A20) of the inventory of ordinary bookstores, just like the two neighborhood bookstores that are plaintiffs in this case. Nor is it about marginal or esoteric items within such bookstores. It is about serious works of literature, about popular bestsellers, about a diverse range of books of medicine, sociology, and psychology. (For example, Virginia conceded below (see C.A. Va. Br. 27-28) that the statute would cover Jackie Collins's *Hollywood Wives*, a popular work of fiction that was on the *New York Times* best seller list for more than six

months in 1983-84.) It is about any book or periodical that describes or depicts human passion and sexuality in a way that makes it unsuitable for a 10- or 12-year old.

It would seem clear, for instance, that Nabokov's *Lolita*, or William Faulkner's *Sanctuary* (with its powerful, and intentionally horrifying, scene of a sadistic rape), or Joyce's *Ulysses*, or Philip Roth's *Portnoy's Complaint*, are just the sort of books that are vulnerable to attack under the Virginia juvenile display law. They are books that might very well be characterized as appealing to the "morbid" and "prurient" interest of a youngster; and the adult consensus would surely be that they are unsuited to (and lacking in merit for) youths not yet in their teens.

What, then is a Virginia bookstore supposed to do about these works? For many years, it has been the law of Virginia that sexually explicit material may not be *sold* to juveniles; and if a child tries to buy a book with explicit sexual content, a sensible bookseller will tell him or her to run along. But the new Virginia statute does not address sales to minors. It forbids the *display* of the work in *any* way that has the effect of permitting a juvenile to "examine and peruse" it. The display does not have to be intrusive or explicit or prurient; the statute is in no way restricted to material that might present a blatant or inviting sexual image or message to a child passing by. It is violated as long as any juvenile can pick up the book and examine its contents.

Under the statute the Virginia bookseller must, therefore, do one of three things: he can eliminate *Lolita* and *Sanctuary* and *Ulysses* and *Portnoy's Complaint* from his inventory entirely. He can put them in a segregated "adult" section of the store (making it difficult and embarrassing for adults to examine them), or remove them from display and sell them only to customers who specifically ask for them. Or he can exclude all juveniles from the store entirely.

Our submission is simple: the First Amendment does not permit the State to put such heavy burdens on the

access of adults (or even of older juveniles) to a vast range of books and magazines solely on the ground that it would be unsuitable, because of their sexual content, for the youngest child to have access to them. Books and magazines are at the very heart of free speech. They are the sustainers of our intellectual and political and moral lives. Free trade in ideas requires free trade in books and periodicals. Serious obstacles to the ready availability of books and magazines represent a mortal danger to the ideal of a free and confident society.

1. *The First Amendment Prohibits A State From Limiting Adults To Books That Are Suitable For Children.*

This Court unanimously held three decades ago that the First Amendment does not allow a state "to reduce the adult population * * * to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383-384 (1957). In *Butler*, the state made it a criminal offense to sell or distribute to the general public sexually offensive materials that would have a "harmful" influence upon minors. The state defended the statute on the ground that it was "exercising its power to promote the general welfare" by "quarantining the general reading public" from such books in order to "shield juvenile innocence" (*id.* at 383). The Court rejected this argument, holding that the restriction on adult access to that which was suitable for minors "arbitrarily curtails one of those liberties of the individual * * * that history has attested as the indispensable conditions for the maintenance and progress of a free society" (*id.* at 384). To limit what adults can read in order to keep indecent materials from children, the Court stated, "[s]urely * * * is to burn the house to roast the pig" (*id.* at 383).

The Court consistently has adhered to the guiding principle of *Butler*. In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), for example, the Court held unconstitutional a state commission that restrained the "sale, distribution or display" (*id.* at 61) of books and magazines that were designated as objectionable for minors but

were not obscene for adults. Relying on *Butler*, the Court reasoned that although the commission's supposed concern was limited to youthful readers, its action invariably entailed the "suppression of the listed publications; adult readers are equally deprived of the opportunity to purchase the publications in the State" (*id.* at 71). In *Jacobellis* v. *Ohio*, 378 U.S. 184, 195 (1964), the Court reiterated that the legitimate state interest in protecting children from sexually explicit material "does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children'" (quoting *Butler*). And in *Pinkus* v. *United States*, 436 U.S. 293 (1978), the Court again relied on *Butler* in holding that the relevant "community" for deciding whether material is obscene for adults may not include children; even though the inclusion of minors in that standard would "not have an effect so drastic as the *Butler* statute," nevertheless "a jury conscientiously striving to define the relevant community of persons * * * would reach a much lower 'average' when children are part of the equation than it would if it restricted its consideration to the effect of allegedly obscene materials on adults" (*id.* at 298).

The Court most recently reaffirmed the *Butler* principle in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which invalidated under the First Amendment a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. The government defended the statute on the ground that, by limiting the availability of this material to minors, it assisted parents' efforts to control the manner in which their children became informed about sensitive subjects such as birth control. Although accepting that this interest was substantial, the Court held that it did not justify the statute's inhibition on freedom of speech (*id.* at 73-74):

> This marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults. We have previously

> made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population . . . to reading only what is fit for children" [quoting *Butler*]. The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.

See also *id.* at 79 (Rehnquist, J., concurring in the judgment); *Wilkinson* v. *Jones*, 107 S.Ct. 1559 (1987), aff'g 800 F.2d 989 (10th Cir. 1986) (invalidating state cable television statute intended to protect children from "indecent material").

The State argues (Br. 9, 18, 25, 32) that *Butler* is inapplicable here because the display provision—even if it has a significant effect on adults—does not altogether "prohibit" adult access to covered materials and does not deny adults "ultimate access" to the materials. But, as *Youngs Drug* makes clear, the First Amendment prevents the government from placing substantial roadblocks in the way of adult access to constitutionally protected books and periodicals even if such restrictions "fall short of a direct prohibition against the exercise of First Amendment rights" (*Laird* v. *Tatum*, 408 U.S. at 11) or limit "freedom of expression only incidentally" (*Schad* v. *Mount Ephraim*, 452 U.S. 61, 68 n.7 (1981)). See also *Erznoznik*, 422 U.S. at 211-212 n.8. Virginia, for example, surely could not ban the sale of all sexually candid (but non-obscene) materials in any bookstore and insist that such materials be purchased solely by mail, even though such a scheme might well reduce or eliminate juvenile access to "harmful" publications and would not "altogether bar" "ultimate access" by adults.

It is of course true that this Court held in *Ginsberg* v. *New York*, *supra*, that a state may prohibit the sale of sexually explicit material to minors even if the proscribed material is not "obscene" as to adults. We do not question the *Ginsberg* ruling here. The critical point, however, is that *Ginsberg* in no way qualified the principle of *Butler*, because the statute in *Gingsberg* had no spillover impact whatever on adults: it simply prohibited the

sale of certain materials *to juveniles*. The Court in *Ginsberg* itself recognized this distinction, stating that the New York statute did not prevent bookstores "from stocking the magazines and selling them to persons 17 years of age or older" (390 U.S. at 634-635).

The fact that a ban on sale to minors, unlike a ban on displays, has no spill-over effect on adults has a further important consequence: the injury to First Amendment interests from misapplication of the statute is immeasurably greater in the case of a display statute. If a bookseller mistakenly refuses to sell a book to a minor that in fact is not "harmful to juveniles," the damage is limited to that one person. But if a bookseller decides not to display a book or magazine because of an erroneous fear that it falls within the Virginia statute, the damage is suffered by every customer of the store.

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978), which Virginia invokes (Br. 20, 26), does not modify the general principle established by *Butler*. In *Pacifica*, the Court, relying in part on a concern for children in the listening audience, held that the First Amendment did not prevent the FCC from regulating a daytime radio broadcast that was indecent but not obscene in its use of filthy language. In reaching that "narrow[] * * * holding" (438 U.S. at 750), the plurality opinion emphasized that, of all forms of communication, broadcasting "has received the most limited First Amendment protection" (*id.* at 748). It pointed out that broadcasting has "established a uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children, even those too young to read" (*id.* at 748, 749). In particular, the plurality noted, broadcasting exposes listeners—including children—to being "unexpected[ly]" confronted by indecent language "in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder" (*id.* at 748). See also *id.* at 759-760 (Powell, J., concurring). The plurality added that the FCC's "action does not by any means reduce adults to

hearing only what is fit for children" because of the adequacy of alternative means of dissemination (*id.* at 750 n.28 (citing *Butler*)). See also *id.* at 760, 762 (Powell, J., concurring).

Pacifica does not justify the Virginia display provision. As the Court recognized in *Youngs Drug*, 463 U.S. at 74, *Pacifica* cannot be extended beyond "the special interest of the Federal Government in regulation of the broadcast media" and "does not readily translate into a justification for regulation of other means of communication." Virginia's display statute seeks to regulate just such an "other means of communication"—one that is utterly different from broadcasting. The display of books and magazines in bookstores and newsstands is not, like broadcasting, a licensed activity that is subject to pervasive governmental regulation and supervision. The Virginia display statute cannot be defended as a protection of unwitting parents and children against the unexpected invasion of the home (in daytime hours) by unsolicited and unwanted indecent language. And, unlike the regulation at issue in *Pacifica*, the Virginia statute fails to leave open adequate alternative means of adult access to constitutionally protected materials.

In sum, the First Amendment imposes a fundamental limitation on a state's power to act for the purpose of protecting minors from sexually explicit (but non-obscene) materials: it may not use a method that substantially infringes the rights of adults to have access to books and other materials that they have a constitutional right to peruse. As both lower courts held, it is just that limitation that Virginia's display provision violates.

2. *Virginia's Juvenile Display Statute Impermissibly Restricts Adults' Access To Constitutionally Protected Materials.*

There is no doubt that Virginia's display statute imposes severe restrictions on adult access to books and other materials that are constitutionally protected. That is why every court that has considered the constitution-

ality of juvenile display provisions, whether ultimately upholding or invalidating the particular statute, has recognized the substantial effect that such provisions have on the availability of books and periodicals for adults.[9]

The Virginia statute prohibits the "display" of covered materials "in a manner whereby juveniles may examine and peruse [them]." It is the display itself—wholly apart from any actual examination or perusal by any juveniles—that is proscribed. The display itself need not

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[9] A number of courts have struck down juvenile display provisions under the First Amendment. See *American Booksellers Ass'n* v. *Webb*, 643 F. Supp. 1546, 1548, 1553 (N.D. Ga. 1986) (statute "imposes an unreasonable burden on the First Amendment rights of authors, publishers, booksellers, and adult readers" and "unduly hampers an adult's access to protected expression"); *Rushia* v. *Town of Ashburnham*, 582 F. Supp. 900, 904 (D. Mass. 1983) (statute "necessarily prevents perusal by, and limits sale to, adults"); *American Booksellers Ass'n* v. *McAuliffe*, 533 F. Supp. 50, 53, 56 (N.D. Ga. 1981) (the statute's "effect * * * is to deny adults as well as minors access to communicative materials" and "infringes on the protected rights of adults"); *Hillsboro News Co.* v. *Tampa*, 451 F. Supp. 952, 954 (M.D. Fla. 1978) (statute "necessarily limit[s] display to adults of only such books and printed materials as are fit for display to children, thus depriving adults of material that is protected as to adults"); *American Booksellers Ass'n* v. *Superior Court*, 181 Cal. Rptr. 33, 38 (Ct. App. 1982) ("it appears inescapable that by placing the publications outside the reach of minors they will also be placed outside the reach of many adults," thus "deny[ing] access to adults as well as to children"); *Tattered Cover, Inc.* v. *Tooley*, 696 P.2d 780, 784 (Colo. S. Ct. 1985) ("the state cannot prevent adults from reading or having access to these materials on the ground they would be objectionable if read or seen by children"); see also *Calderon* v. *Buffalo*, 402 N.Y.S. 2d 685 (App. Div. 1978).

Even courts that have sustained some form of juvenile display provision have recognized the adverse effect of such statutes on adults' access. See *Upper Midwest Booksellers* v. *Minneapolis*, 780 F.2d 1389, 1394, 1395, 1397 (8th Cir. 1985) (statute prohibiting display except in a blinder rack or sealed wrapper); *MS News Co.* v. *Casado*, 721 F.2d 1281, 1288, 1289 (10th Cir. 1983) (statute prohibiting display except in a blinder rack); *American Booksellers Ass'n* v. *Rendell*, 481 A.2d 919, 941 (Pa. Super. Ct. 1984) (statute, as construed, prohibiting ostentatious showing that emphasized or advertised the nature of the materials).

be explicit or prurient or ostentatious, or in any way call attention to the sexually explicit nature of the materials. (In this respect the Virginia statute differs sharply from the statutes of a number of states that prohibit the display of sexually explicit magazine and book *covers*.[10]) It is enough to constitute a crime under Virginia law that a book deemed "harmful to juveniles" can be found on a bookstore's open shelf.

It is the extreme breadth of Virginia's statute that ensures that its impermissible spill-over effects on adults will be substantial. The statute encompasses "*any* book, pamphlet, magazine, printed matter however reproduced, or sound recording" that contains "explicit and detailed" accounts of sexual conduct that may be "harmful to juveniles." This statute is, therefore, emphatically not directed only to explicit picture magazines with no editorial content; it covers textual descriptions of human passion and sexuality—and that of course is why many books on any reading list of a course on modern American (or French or English) literature constitute potential candidates for coverage.

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[10] In contrast to Virginia, seven states prohibit the display to juveniles of sexually explicit materials unsuitable for minors that are on the cover of (or otherwise visibly displayed in) books and magazines. See Me. Rev. Stat. Ann. tit. 17, § 2912 (1983 & 1986 Supp.); Miss. Code Ann. § 97-5-27 (1986 Supp.); Mont. Code Ann. § 45-8-202 (1985); N.C. Gen. Stat. §§ 14-190.13 and .14 (1986); N.D. Cent. Code § 12.1-27.1-03.1 (1985); 18 Pa. Cons. Stat. Ann. § 5903 (1983); Vt. Stat. Ann. tit. 13, § 2804b (1986 Supp.). (Several other states have statutes prohibiting visible displays and also have broader display statutes like Virginia's, see Fla. Stat. Ann. § 847.0125 (1987 Supp.); La. Rev. Stat. Ann. § 14:91.11 (1986); N.M. Stat. Ann. § 30-37-2.1 (1985 Supp.); R.I. Gen. Laws § 11-31-10 (1986 Supp.).) In addition, a number of states prohibit displays (whether to adults or juveniles) of sexually explicit materials that are publicly visible from outside the bookstore. See, *e.g.*, Miss. Code Ann. § 97-5-29 (1986 Supp.); Mo. Ann. Stat. §§ 573.010(14) and .060 (1979); N.J. Stat. Ann. § 2C:34-4 (1982); N.Y. Penal Law § 245.11 (1987 Supp.); 18 Pa. Cons. Stat. Ann. § 5903 (1983); S.C. Code Ann. §§ 16-15-290, 390 (1985).

The statute also defines "juveniles" with extreme breadth: *any* "person[s] less than eighteen years of age." Va. Code § 18.2-390(1). The statute thus forbids the display of any materials that would be unsuitable for a 10-year-old, even though they would not be inappropriate for a 17-year old (let alone for an adult). For this reason, the display provision violates the First Amendment rights of older juveniles as well as adults. The statute limits the access of older minors to materials that are not "harmful" for their age groups and therefore are constitutionally protected as to them. See *Youngs Drug*, 463 U.S. at 74 n.30; *Erznoznik*, 422 U.S. at 212-214 & n.11.[11]

The Virginia display statute's standard of "harmful to juveniles" is, further, so vague and unmanageable in the display context that booksellers, fearful of criminal sanctions, will keep a wide berth in determining whether a particular book or magazine may be displayed, thereby broadening the sweep of the statute in practice. See *Smith* v. *California*, 361 U.S. 147, 153-154 (1959). It is hard enough to apply the three-part *Miller* test to decide whether a particular book is or is not obscene; it becomes even more difficult when the task is to decide whether a book that is not obscene for adults nonetheless lacks "serious literary, artistic, political or scientific value" for a child. And that difficulty is in turn compounded when the standard has to be applied, not to a single book at the point of sale, but to the bookstore's entire inventory as applied to a hypothetical composite juvenile.[12]

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[11] The court of appeals "question[ed] whether an older minor's first amendment rights can be limited by the standards applicable to younger juveniles. * * * While the pre-amendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, the current statute's display provision is not susceptible to such a selective application" (J.S. App. A7 n.7).)

[12] The typical bookstore relies on its distributors not to ship materials that are obscene as to adults. (In fact, retailers whose stock does not primarily consist of books and magazines are gen-

Finally, all of this must be visualized within the actual conditions under which the typical bookstore operates. New books flood in by the dozens each day; the clerks on hand barely have enough time to keep up with the sales slips and the shoplifters, much less read the new arrivals line by line looking for something that might be startling for young eyes. The temptation will be to take the easy way out and to refuse to display any books that arguably may be considered "harmful to juveniles."

The result of the statute is that an adult customer who wanders into a bookstore in Virginia will not find such materials on the shelves. It is true that an adult intent on buying a specific book can take the initiative and ask for it (assuming it has not been entirely eliminated from inventory), but that is not how the overwhelming majority of books and magazines are sold. As common experience demonstrates, the sale of books is heavily dependent upon browsing. Customers stroll the aisles, picking up books and periodicals whose title or dust jacket attracts their attention, thumbing through the volumes and reading selected passages, and eventually making impressionistic judgments whether or not to purchase. By prohibiting that practice in regard to a large number of constitutionally protected books and magazines, the Virginia statute has a devastating impact on central freedoms protected by the First Amendment.

This conclusion, grounded in common experience, is amply confirmed by the record in this case. The district court found that "[c]ustomers often become familiar with a book, and desire to purchase it only after browsing and looking through the shelves" (J.S. App. A20). Likewise, "[c]ustomers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content" (*ibid.*). To

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erally supplied by jobbers or wholesalers who unilaterally select the materials to be sold (J.A. 24).) That protection is not available, of course, in regard to books that can lawfully be sold to adults, and can perhaps even be sold to mature young adults, but cannot be displayed to "juveniles" as a class.

facilitate access, therefore, "at least one copy of every title carried by Ampersand Books is on display" (*ibid.*). "[T]he display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell" (*ibid.*). The "unavoidable" consequence of the Virginia display provision is "severely [to] limit[ ] sales of [constitutionally protected books] to adults" by "severely limit[ing] the ability of adults to examine these * * * materials" (*id.* at A27).

Virginia's principal response to these problems (see, *e.g.*, Br. 9, 17-18, 24, 36) is the suggestion that the prohibition on display of sexually forthright materials is no different than—indeed, flows naturally from—the prohibition on sales to juveniles that this Court upheld in *Ginsberg*. But the argument overlooks fundamental differences between sale and display prohibitions. As noted above (see pages 29-30, *supra*), a prohibition on sales to minors has an impact only on minors; it has absolutely no impact on the rights of adults. On the other hand, limitations imposed on public displays of books have a major spill-over effect on adults. Consequently, prohibitions on display are inherently overbroad, extending well beyond the specific objective said to justify the statute.

Furthermore, a prohibition on sales to juveniles does not impose intolerable burdens on the bookseller, who need not interpret and enforce the prohibition until a minor seeks to make a purchase and presents himself at the counter with book in hand. At that point, the bookseller can take account of the nature of the material and the age and maturity of the individual in deciding whether the statute allows the sale of that particular book to that particular youngster. And whatever decision is made has no effect on the availability of that or any other book to adults or older juveniles.

Contrary to Virginia's suggestion (Br. 30), a bookseller's implementation of a display prohibition is not self-selecting and individualized. The statute imposes an

affirmative obligation on the bookseller not to display proscribed materials in a manner that permits juveniles to view them. Thus a display prohibition requires the bookseller immediately to review his entire inventory, make broad and abstract judgments about the suitability of books for juveniles of widely varying ages, and substantially alter the nature of his trade practices. These constraints unavoidably restrict adults' access to constitutionally protected materials and continually affect the bookseller's conduct of his business.

3. *There Are No Constitutionally Acceptable Methods For Complying With Virginia's Juvenile Display Statute.*

Virginia suggests that there are several ways for booksellers to comply with the statute that would avoid imposing unconstitutional burdens on adult readers and booksellers. The courts below correctly rejected the State's arguments, holding that the alternatives are themselves "unduly burdensome" on First Amendment rights (J.S. App. A10) and "commercially impractical" (*id.* at A27).

First, bookstores could comply with the display provision by refusing to stock any materials that might be "harmful to juveniles" under the statute. But that is precisely the result condemned by the First Amendment: "reduc[ing] the adult population * * * to reading only what is fit for children" (*Butler*, 352 U.S. at 383). In addition, as the district court found, this course is wholly unrealistic (J.S. App. A21). Because the juvenile display provision covers a significant percentage of the materials in a typical bookstore, including "very popular books" and "best sellers" (*id.* at A20-A21), the elimination of all such titles would be economically crippling.[13]

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[13] Booksellers would also find it difficult to restrict their orders of new books to materials not covered by the statute, because they

Second, bookstores could keep books considered "harmful to juveniles" behind the counter. But it would surely be a dramatic—and tragic—change in the "free traffic" in important and controversial books if prospective readers could find them only by asking specifically for a specific title, if the inveterate reader's custom of happening on books by serendipitous chance were simply eliminated. Ready access to freely displayed books is a crucial element in an active intellectual life concerned with books. And, as noted above, display of books is, as a practical matter, vitally important to their sale. To "force adults to use other means (beyond simply browsing through the shelves) to find out about protected literature" and to require them to ask to see a particular volume would "inhibit many individuals from exercising their right to examine and purchase the material" (J.S. App. A27; see also *id.* at A10).

This alternative, too, would present the bookseller with severe practical problems. Given the volume and diversity of books that are subject to the display provision, it would be virtually impossible for a bookseller to sort through his inventory to identify those items deemed "harmful" by statute. See *Smith* v. *California*, 361 U.S. at 153. Moreover, maintaining such books out-of-sight would require a fundamental and disruptive change in the physical layout (and the general ambiance) of bookstores.

Third, bookstores could create an "adults only" section for display of materials that might be "harmful to juveniles." But, even putting aside problems of book selection, store space, and monitoring, this alternative would do little to facilitate adult access, because many adults would be reluctant and embarrassed to browse in an "adults only" section, and "sales of books placed in this

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rarely have the opportunity to review books before ordering them (J.S. App. A21).

new area would undoubt[ed]ly drop" (J.S. App. A21; see also *id.* at A10).[14]

Fourth, bookstores could simply exclude youngsters from the premises. To turn general bookstores into "adult" establishments, however, "would create the impression that the store deals primarily in 'adult only' or pornographic material, which would have a devastating impact upon the store's business" because of the reluctance of most adults to patronize such a store (J.S. App. A21; see also *id.* at A10, A27). This "solution" also would have a dramatic impact upon the sale of children's books, which constitute a significant share of the business of many bookstores (see page 7, *supra*). And the blanket exclusion of minors would have a serious effect on their First Amendment right to buy and read materials that are suitable and constitutionally protected for them.

These intractable problems of compliance are especially pronounced with respect to booksellers such as newsstands, supermarkets, drugstores, and convenience stores (see J.A. 24). Non-bookstore vendors—the neighborhood Safeway—cannot realistically be expected to set up an "adults only" section or to exclude minors from the premises, since books occupy only a small portion of their floor space and account for only a small percentage of their total revenues. See *American Booksellers Ass'n* v. *Webb*, 643 F. Supp. 1546, 1553 n.15 (N.D. Ga. 1986). The probable effect of the Virginia statute is that outlets such as these will simply cease to carry any reading materials that might be covered by the statute or will dispense with

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[14] See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 86 (1960):

> To prohibit dealers from exhibiting within the view of adolescents books and magazines that can be sold only to adults would raise the additional problem of undue interference with the materials' primary audience. Beyond these obstacles is the disrupting effect of "adult only" counters or shelves in book stores and at newsstands * * *. To avoid these difficulties cautious dealers might well decide to abandon all books and magazines claimed by any one to be unsuitable for adolescents.

their book departments altogether. See *id.* at 1553; Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 86, 104 (1960). Yet many adults purchase their reading materials (especially paperbacks and magazines) in such establishments.

Fifth, Virginia speculates (Br. 29-30) that a bookseller can comply with the juvenile display provision by placing a color-coded "adults only" tag on books covered by the statute or by placing them in an "adults only" stand or blinder rack. But these steps would not satisfy the statute, which by its plain language prohibits the *display* of "harmful" materials and not simply their actual *perusal* by juveniles. As the district court stated, "[i]f the proscribed material is on a shelf in an area where juveniles are permitted to roam, then the item is 'on display' where the juvenile 'may' examine it even if the item is tagged" (J.S. App. A27). In fact, placing a warning tag on books and magazines or displaying them in special racks would not stop any determined juvenile from examining and perusing the materials; it is likely to have exactly the opposite result. See *id.* at A10.

In any event, even if the practices suggested by the State constituted compliance with the juvenile display provision, that would not solve the First Amendment problems presented by the statute. Labeling books as "adults only" or storing them in "adults only" racks would seriously inhibit adults from thumbing through and purchasing such materials. If the First Amendment is violated by requiring a general bookseller to become an "adult" bookstore or to establish a separate, cordoned-off, "adults only" section, it is equally violated by these other forms of "adults only" designations.

Undaunted by these difficulties, Virginia argues (Br. 30-31) that the scienter element in the display provision somehow renders the foregoing compliance alternatives

adequate to save the statute.[15] But the scienter element does nothing to relieve booksellers of the obligation imposed by the statute to review all the books they have or wish to stock in order to identify materials that are "harmful to juveniles." A bookseller who puts colored tags on his inventory or establishes an "adults only" section, for example, plainly could not claim a lack of scienter if he made no effort to evaluate the contents of his books and magazines before coding or displaying them. Nor does the scienter requirement ameliorate in any way the restrictions that Virginia's statute places on adult access to constitutionally protected books.[16]

What the State fails to appreciate is that it is the fear of prosecution and the pressure from organized groups in the community—not just the fear of a criminal conviction—that impel responsible booksellers to comply with statutes such as this. It is no answer to say that a bookseller charged with a violation of the statute will not be found guilty absent proof of scienter. The evil of the Virginia statute lies not in the spectre of jails filled with booksellers but in the reality of massive self-censorship, as booksellers struggle to take what the State calls "reasonable means" (Va. Br. 30) to restrict constitutionally protected books and periodicals from the view of children—and, necessarily, of adults as well.

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[15] In order to comply with this Court's decision in *Smith* v. *California*, *supra*, the Virginia statute provides that the display to juveniles must be made "knowingly" (Va. Code § 18.2-391(a)), which is broadly defined to mean "having general knowledge of, or reason to know, or a belief or grounds for belief which warrants further inspection or inquiry of * * * the character and content of any material described herein which is reasonably susceptible of examination by the [bookseller]" (Va. Code § 18.2-390(7)).

[16] It is in the context of *sales*, where the bookseller must make a judgment about the suitability of a single book for a juvenile of a given age and maturity, that the scienter requirement offers meaningful protection.

4. *The Juvenile Display Statute Cannot Be Justified As A "Protection Of Minors" Or A "Time, Place, And Manner" Restriction And Should Be Invalidated On Its Face.*

Virginia advances three reasons why the juvenile display provision should not be invalidated despite its severe spill-over effect on the availability of constitutionally protected materials to adults: (1) the display provision is justified by the state interest in shielding minors from sexually explicit books and magazines; (2) the statute is a valid "time, place, and manner" regulation; and (3) the provision is not substantially overbroad and can be narrowly construed, so that it is not invalid on its face even if it is susceptible of unconstitutional applications. These arguments afford no basis for salvaging the statute.

a. *The Display Statute Is Not Saved By The State Interest In Protecting Minors From Sexually Explicit Materials.*

The principal argument put forward by Virginia and its amici to support the juvenile display statute is that its restrictive impact on adult access to books and periodicals is justified by the State's overriding interest in "protecting children from exposure to pornography" (Va. Br. 9). Amicus City of Minneapolis states that the "[a]mendment helps prevent the knowing and commercial pandering to children of harmful material, patently and offensively appealing to or developing their prurient interest in sex without offering any ideas of serious value, contrary to the parent's instructions, educational efforts or wishes" (Br. 19-20). Amicus Institute for Youth Advocacy describes research that purports to support the conclusion that serious harm is done by the exposure of children to "X-rated materials" and "pornography" (Br. 9-12). Amicus National Legal Foundation stresses that "minors are exposed to obscene materials through public displays," that curiosity leads minors to

seek "access to obscene materials," and that "exposure to pornography" can cause harm to minors (Br. 12-15). It adds that "[i]t is well known that pornographic materials are used by adult pedophiles in seducing and conditioning children" (Br. 15) and that juvenile display statutes are based on the conclusion that "minors are harmed by exposure to obscene materials" (Br. 16).

We do not intend to denigrate the states' substantial interest in ensuring that children not be exposed to pornography and in controlling juvenile access to sexually candid materials unsuitable for minors. But there also exists a countervailing concern of fundamental constitutional import: the State must not be permitted to use its authority to place serious inhibitions on adult access to books and other expressive materials that are protected by the First Amendment. Both of these concerns have heretofore been sensitively accommodated by this Court's cases; that balance is drastically upset by Virginia's display statute.

i. It is absolutely critical to remember that the vast bulk of the materials that are called to mind by Virginia's and amici's references to "pornography" and "X-rated materials" and "obscenity," and the vast bulk of the materials referred to in the cited research, comprise hard-core materials that fall comfortably within the range of what the State is completely free to ban as "obscene" under the standards of *Miller* v. *California*, *supra*. It is *these* materials that are obviously at the heart of the State's concern to shield children from "harmful" depictions of sexuality. It is *these* materials that, this Court has concluded, are without value in the arena of free speech for adults *or* children, and that may therefore be entirely suppressed or—*a fortiori*—consigned to the shadow of the "adult" bookstore.

The overwhelming proportion of the State's interest in this field can be accomplished by vigorous enforcement of the concededly constitutional provisions that bar both

the sale and the display of true obscenity. What is left over is material that, by hypothesis, *has* value in the eyes of the First Amendment—that may, indeed, be work of the greatest possible beauty and importance—but that may be unsuitable for juveniles because of its depiction or description of sexual matters.

ii. Focusing, then, *on these materials alone*, we remind the Court again that there is no dispute here about the power of the State, under *Ginsberg*, to forbid the *sale* of explicit but non-obscene materials to juveniles. It is thus concededly the obligation of booksellers, at the point of sale, to make sure that juveniles do not buy books or magazines that are inappropriate to their age and maturity.

We submit that the State's power to prevent the sale of such materials to juveniles covers virtually all of the remaining territory where there exists a *serious* concern about harm to juveniles. What is left over? It is simply the possibility that a youngster will hang around in a bookstore—not an "adult" bookstore but an ordinary bookstore—and sneak a look at sexy passages in *Lady Chatterley's Lover* or *The Joy of Sex* or *Portnoy's Complaint*. Whatever minimal harm can come from such *transitory* exposure to works that are *not* obscene is surely outweighed by the policies of the First Amendment, which bars the State from imposing substantial roadblocks in the way of adult access to the perusal of constitutionally protected material. As the Court held in *Youngs Drug*, 463 U.S. at 73, a "marginal degree of protection" of juveniles does not justify substantial and sweeping restrictions on adult access. See also *Butler*, 352 U.S. at 383 (statute "quarantining" books from general public is "not reasonably restricted" to protection of juveniles even though materials sold to adults frequently find their way to juveniles, see, *e.g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 58 n.7 (1973)).

The Court's cases dealing with problems of juvenile access clearly recognize that the law cannot shield youngsters *entirely* from exposure to a huge variety of stimuli in our society, and that guiding children as they come into increasing contact with this adult world is one of the responsibilities of parenting. What the Court has made clear is that it is not permissible for a State to deal with this problem by the "preemptive strike" of trying to turn the adult world into a toy-park designed for kids. And that, precisely, is the chief vice of the Virginia statute, which requires bookstores and newsstands to reorganize themselves so that only books and magazines suitable for a 12-year old are readily accessible to adults.

iii. In any event, Virginia's juvenile display statute approaches the problem—if it is a problem—of transient juvenile access to non-obscene (but unsuitable) materials in a particularly heavy-handed and indiscriminate way. The Virginia provision is not restricted to displays that are prurient or salacious or might otherwise pander to the sexual curiosity of youngsters. It does not merely require—as some statutes do—that explicit covers be hidden behind blinder racks or paper wrappers.[17] It does not limit itself to the suppression of explicit materials that are thrust before unwitting and vulnerable youngsters. It sweeps broadly to encompass everything, including great works of literature, that may be inappropriate for children because of forthright sexual references.

Whatever power the State may possess to meet its narrow residual concern to prevent even the transitory exposure of youngsters to non-obscene materials that have some sexual content, that power may not be exercised by blunderbuss legislation that is "not reasonably restricted to the evil with which it is said to deal" (*Butler*, 352 U.S. at 383). For we stress again that the countervailing concern—the constitutional prerogative of adults to

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[17] See notes 9, 10, *supra*.

have ready access to the perusal of expressive materials even if they are unsuitable for children—is itself one of transcendent importance.

b. *The Display Statute Is Not A Valid "Time, Place, And Manner" Regulation.*

Virginia briefly asserts (Br. 38-39) that the juvenile display provision can be defended as a valid "time, place, and manner" restriction. That doctrine is designed to permit reasonable state regulation to ensure that First Amendment rights are exercised in a way—at a "time," in a "place," and in a "manner"—that is consistent with the general usage of the forum. It is the "nature of the place" and "the pattern of its normal activities" that determine whether a governmental restriction is a valid regulation of time, place, and manner; "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Schad* v. *Mount Ephraim*, 452 U.S. at 75.

The Virginia display provision is not of this stripe. The display of books can hardly be deemed "incompatible" with the "normal activity" of a bookstore. Nor can it be contended that the statute is based on any interest the State might have in regulating the "time, place, and manner" of these bookstore displays—as distinguished from the substantive interest it asserts in shielding juveniles from sexually explicit materials.

Time, place, and manner restrictions are in any event valid only if they operate "without reference to the content of the regulated speech" and "leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984). See also, *e.g.*, *Jews for Jesus*, slip op. 3-4; *Youngs Drug*, 463 U.S. at 69 n.18. The Virginia statute fails on both scores. It is obvious that the statute is not content-neutral; application of the statute turns en-

tirely on the content-based determination that materials are "harmful to juveniles." Thus, "enforcement authorities must necessarily examine the content" of books and periodicals in order to decide whether they are subject to the restriction. *FCC* v. *League of Women Voters of California*, 468 U.S. 364, 383 (1984). And it is equally obvious, given the comprehensive coverage of the display provision, that it does not leave open "ample" means of adult access to covered books and magazines.[18]

c. *The Display Statute Is Invalid On Its Face And Cannot Be Saved By A Narrowing Construction.*

Virginia repeatedly insists on characterizing appellees' case as one that challenges the State's statute as "facially overbroad" (Br. 17; see also Br. 17-22, 24-25). It then uses this characterization to make a final effort to salvage the juvenile display provision by suggesting (Br. 34-37) that the statute, even if unconstitutional in certain applications, is subject to narrowing constructions and is not so substantially overbroad that it should be invalidated on its face. See *New York* v. *Ferber*, 458 U.S. 747, 769-770 (1982); *Erznoznik*, 422 U.S. at 216.

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[18] *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986), cited by Virginia (Br. 38), are fully consistent with this conclusion. In those cases, the Court upheld local zoning ordinances for adult movie theaters that were based "not [on] the *content* of the films shown * * * but rather [on] the *secondary effects* of such theaters on the surrounding community." *Renton*, 106 S. Ct. at 929 (emphasis in original). The Court found that the ordinances were "unrelated to the suppression of free expression" within the theaters (*ibid.*); it was the "secondary effect which these zoning ordinances attempt[ed] to avoid, not the dissemination of 'offensive' speech" (*American Mini Theatres*, 427 U.S. at 71 n.34 (plurality opinion)).

The measures upheld in *American Mini Theatres* and *Renton* are a far cry from the juvenile display provision. The Virginia statute is directed at the content of covered materials; the State is concerned about the effect on readers themselves, not about the "secondary effects" of neighborhood bookstores on nonreaders. See *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 94 (1977).

It is not easy to pin down exactly what role the notion of "facial overbreadth" plays in this case. The First Amendment problem here is not that the statute encompasses two different types of activity, one that is constitutionally protected and the other that is not. Rather, it is that the very same activity—the display of books with a sexual content in general bookstores frequented by adults and juveniles—is constitutionally protected for adults but not for minors, so that the State's prohibition of displays accessible to minors necessarily infringes on the access of adults. This overbreadth cannot be cured simply by construing the statute in a way that excludes regulation of the constitutionally protected activity; in this context, such activity cannot be separated from that which is constitutionally unprotected.

Depending, then, on what is meant by "substantial overbreadth," there can be no doubt that the doctrine's requirements are either fully satisfied here or are irrelevant. The display statute is "substantially" overbroad because *every* time it causes a book to be removed from display in order to protect juveniles, the effect of the removal is to restrict the constitutionally protected access of adults to that book. See *Houston* v. *Hill*, slip op. 7. On the other hand, if the State's point is simply that the statute is unlikely to lead to the disappearance of many books that *juveniles* have a constitutional right to peruse, the proposition is irrelevant even if true.[19]

What is further apparent is that Virginia has not offered any plausible narrowing construction that would eliminate the unconstitutional burden that this statute places on adult access. Virginia keeps hinting that the statute will apply only to a very narrow category of

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[19] Its truth is certainly disputable, in two respects. The breadth of the statutory terms may easily lead to overcompliance, so that even texts suitable for all youngsters will, in an excess of caution, be purged from bookshelves. Second, the constitutional rights of older juveniles are surely invaded if books suitable for them but not for younger readers are removed.

books. But the State provides no *standard* whatever for restricting the wide sweep of the statutory language. See *Houston* v. *Hill*, slip op. 17-19 & n.18. Nor does the State tell us what reasonably expeditious procedures exist for obtaining this narrowing construction. All we have, instead, are vague promises that, if the matter is left to the State's tender mercies, all will be well because the statute will be narrowly enforced. But unchannelled discretion, left to police and prosecutors on the basis of ineffable criteria, to decide when and where to arrest and prosecute is emphatically not the equivalent of the possibility of a "narrow construction" that can save an overbroad statute from facial invalidation. See pages 23-25, *supra*.

The State specifically suggests that the lower courts erred in giving an unduly broad construction to the statutory terms "may" and "examine and peruse"; in the State's view, "may" should be interpreted to require "reasonable certainty," while "examine and peruse" should be understood to mean "inspect in detail" or "read * * * with great care" (Va. Br. 35-36 & nn. 9, 10). Given the weighty interests claimed to be served by the display statute, however, it would be quite artificial to apply it only where it was reasonably certain that juveniles could study "harmful" materials at length, and not to the more common situation where it could be foreseen that juveniles might pick up the materials and quickly (and probably furtively) scan them; a bookstore need not become a reading room in order to "display" materials in a way that juveniles "may examine and peruse" them.

In any case, the constitutional defect inherent in the Virginia statute does not hinge on the meaning of the words "may" or "examine and peruse." Even under the State's strained construction, bookstores would still have to organize themselves so as to make sure that juveniles do not find it possible, with "reasonable certainty," to inspect covered materials "with great care." But what

can this possibly mean? Surely, what it means is that bookstores may not allow any books that contain explicit passages to be displayed on the shop's open shelves—and that if they do so, they will have violated the statute. The State's verbal sleights-of-hand, therefore, do not amount to a meaningful narrowing of the impact of the statute on adults.

CONCLUSION

Until today, booksellers have been free to display their wares—hundreds of thousands of volumes, a multitude of periodicals—for perusal and browsing by all who are interested in the written word. That is what bookstores are, that is how they operate everywhere. We ask that this ancient and honorable tradition—so important to the life of the mind—be allowed to continue, and that Virginia's attempt to interfere with it be invalidated.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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